THE BAIS HAVAAD
HALACHA JOURNAL
Family, Business, and Jewish Life through the Prism of Halacha

VOLUME 5782 • ISSUE LXXVI • PARSHAS HA'AZINU

A PUBLICATION OF THE
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ב"ר משה גרוסמן זצ"ל
Dedicated in loving memory of HaRav Yosef Grossman zt"l

TICKET BOOTH: AN ILLEGAL SUKKAH

Adapted from the writings of Dayan Yitzhak Grossman

There is a well-known fable of a Jew who built a sukkah in violation of a local ordinance. Someone complained, and on Erev Sukkos, the matter came before a just but considerate judge, who ordered that the sukkah be removed—but granted the owner ten days to comply.[1] In this article, we consider the halachos of the sukkah built in violation of the law.

A SUKKAH BUILT ON STOLEN PROPERTY

The Gemara declares that a stolen sukkah is invalid because the Torah states, "*Chag Hasukkos ta'aseh lecha,*" and a stolen sukkah is not *lecha*.[2] The halacha, however, follows the view that as a consequence of the principle of *karka eina nigzeles* (land cannot be stolen), only a sukkah built with stolen materials isn't kosher, but one built on stolen land is valid.[3]

A SUKKAH BUILT ON PUBLIC LAND

Despite the principle of *karka eina nigzeles*, the *poskim* rule that *lechatchilah* a sukkah should not be built on public land.[4] The Darkei Moshe, however, notes that he has not seen people being careful about this. The Magein Avraham struggles to justify the custom, but he ultimately concludes that although such a sukkah is valid *bedi'eved*, one may not recite a *bracha* upon it; since it is tainted by the sin of theft, such a *bracha* would be a *bracha levatalah*.[5]

Other *poskim* are more lenient, at least where no other sukkah is available.[6] The Bais Meir ex-

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1 Divine Judgment, Aish.com; Story: Sukkot, Congregation Beth Israel; Every Sukkah an (Illegal) Outpost, The Muqata; Come let us reason together to defeat partisanship, Florida Jewish Sentinel. While these stories are apocryphal, someone told me she actually experienced something quite similar, multiple times.

2 Sukkah 27b and 31a.

3 Shulchan Aruch O.C. 637:3 and Mishnah Brurah *s.k.* 7-8. Cf. Chazon Ish O.C. *siman* 150 *os* 22 s.v. Sukkah 31a, cited in Biurim Umusafim of the Dirshu edition of the Mishnah Brurah ibid. 8.

4 Darkei Moshe and Rama ibid.

5 Magein Avraham ibid. *s.k.* 3.

6 Elyah Rabah ibid. *s.k.* 4 and Ma'amar Mordechai ibid. *s.k.* 4, cited in

The Bais Havaad on the Parsha

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PARSHAS HA'AZINU

GOOD CONDITION

Excerpted and adapted from a shiur *by Dayan Yehoshua Grunwald*

On the first two days of Sukkos, one must own the *arba'ah minim* in order to fulfill the mitzvah of taking them. Those who do not own their own *arba'ah minim* generally use someone else's set via *matanah al menas lehachzir* (giving a gift on the condition that it is returned afterward). But it is not clear whether *tenai kaful* (a double condition, i.e., where both the "if" and "if not" possibilities are expressed), which is necessary for conditions in other areas of halacha, is required here.

According to the Smag, one must make a *tenai kaful* when giving a *matanah al menas lehachzir* for *arba'ah minim*. The Mordechai disagrees and notes that *Rishonim* debate whether a *tenai kaful* is necessary for conditions outside of *gittin* and *kiddushin* (such as for *mamonos*). The Mordechai states that the halacha follows the Rashbam that it is unnecessary for *mamonos*. The Bais Yosef (O.C. 658) cites this *machlokes* and rules that we follow the Mordechai with regard to *arba'ah minim*.

Although the Bais Yosef elsewhere (E.H. 38) cites both opinions and does not rule definitively like the

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In a Bind

Q Given that women are not obligated in the mitzvah of *arba'ah minim*, may a woman bind the minim together in the *koishekel*?

A R' Yehuda (Mishnah, third *perek* of Sukkah) maintains that "lulav *tzarich egged*"—the lulav must be bound together with the *hadasim* and *aravos*. Though the halacha doesn't follow his view, and one can actually fulfill the mitzvah by picking up the *minim* consecutively and never holding them together in the hand, the minhag is to bind them together with a *koishekel* made of lulav leaves.

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plains that since the "theft" of public land is merely for the duration of Sukkos, and the land will be "returned" intact afterward, and the members of the public observe this and do not protest, it does not constitute theft at all. A *bracha* may be recited, and the admonition of the *poskim* against building such a sukkah is merely a stringency.[7]

Similarly, the Bigdei Yesha explains that members of the public are considered partners in public spaces, and a partner is allowed to engage in temporary construction on partnership land.[8] Additionally, the lack of objection by members of the public to sukkos erected on public land constitutes a tacit (and irrevocable!) concession of the right to erect such sukkos.[9]

The Bikurei Yaakov adds the argument that the government controls public spaces per the principle of *dina demalchusa dina* (the law of the government is legitimate law), and insofar as it does not express objection to sukkos erected there, this constitutes tacit permission.[10]

In light of the above, the Biur Halacha concludes that "we should not object to those who conduct themselves leniently, since there are many authorities that allow it."[11]

A SUKKAH BUILT IN VIOLATION OF THE LAW

The discussion heretofore has been about sukkos built on public property. In the modern era, *poskim* have considered the question of sukkos built on private property but in violation of the law.

R' Yitzchok Zilberstein considers sukkos built in violation of aesthetic zoning regulations. He reports that he put the question to his father-in-law, R' Yosef Shalom Elyashiv, who ruled that this involves a *chashash* of *gezel* and should therefore not be done.[12]

R' Asher Weiss discusses a sukkah built in violation of building safety laws. Although he maintains that there is a religious imperative to obey such laws, as *dina demalchusa dina* and obedience to the law is the "will of the Torah," he nevertheless inclines toward the view that transgressing such a law would not render the sukkah invalid. Insofar as the law is motivated by public safety and not rooted in property rights, there is no issue of theft, and the problem of mitzvah *haba'ah ba'aveirah* (a mitzvah that is fulfilled by violating an *aveirah*)[13] is also inapplicable, since the imperative to obey the law is not a full-fledged mitzvah but merely a matter of the "will of the Torah."

Rav Weiss adds that there is a fundamental difference between the laws of the Torah (both Biblical and Rabbinic) and temporal law. The former are absolute, with no room for compromises, whereas the latter are situational. It is presumably not forbidden by the Torah to jaywalk in the middle of the night, when it is clear that there is no vehicular traffic and not the remotest possibility of danger (and there are no observers present who might learn dangerous habits). Further, it is likely that even the legislators did not intend to forbid jaywalking in such circumstances, but the law is simply unable to formally take into account such distinctions. Rav Weiss concludes that in such cases, we follow the legislative intent, and one is not obligated to obey the letter of the law where there is no danger whatsoever.

Similarly in our case of sukkos that technically violate building safety legislation, since every year hundreds of sukkos are erected throughout the city and the authorities take no action to prevent this and enforce the law, it seems that the government does not object to the sukkos, and there is no problem of *dina demalchusa dina* even though they are technically illegal.[14]

Mishnah Brurah ibid. s.k. 10.

7 Bais Meir ibid., cited in Biur Halacha ibid. s.v. *Vechein bekarka shehi shel rabim.*

8 This argument is made by the Bikurei Yaakov, cited below, as well.

9 Bigdei Yesha ibid. s.k. 3, cited in Biur Halacha ibid.

10 Bikurei Yaakov ibid. s.k. 6, cited in Biur Halacha ibid. For a case where the authorities did object to the construction of a sukkah in a common area, see Dispute over Jewish tradition could nix Christmas trees. Palo Alto Online. https://www.paloaltoonline.com/news/2011/10/10/dispute-over-jewish-tradition-could-nix-christmas-trees

11 Ibid. Cf. Biurim Umusafim ibid. 12.

12 Chashukei Chemed Sukkah pp. 238-40, cited in Biurim Umusafim ibid. 11.

13 Ibid. 30a.

14 Shu"t Minchas Asher *cheilek* 2 *siman* 123 pp. 420-22. In this final argument, Rav Weiss seems to be shifting from an evaluation of the legislative intent and the rational application of the law to whether the executive branch of the government attempts to enforce the law and objects to its violation. This latter point is similar to the Bikurei Yaakov's argument. Perhaps Rav Weiss assumes that executive tolerance is indicative of legislative intent and rational application of the law, but this does not seem entirely obvious.
Rav Weiss's responsum was addressed to R' Zvi Ryzman of Los Angeles, who authored a comprehensive discussion of our topic: *Darsheini: Sukkah Bemakom She'asur Livnosah Lefi Hareshuyos.* He cites additional sources addressing our question, including Shu"t Ohel Yosef (Fried) O.C. *siman* 14 s.v. *Ve'atah ava'er*; Shu"t Yaskil Avdi *cheilek* 7 O.C. *siman* 39; and Shu"t Rivevos Efraim *cheilek* 1 *siman* 424 *os* 2.

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DAYAN YOSEF GREENWALD

While we would think that this is only decorative and in fulfillment of the precept of *noy* (beautifying mitzvos), it appears from the *poskim* that binding the three species together is in fact the *lechatchilah* manner of fulfilling the mitzvah of *netilas* lulav, even though we don't follow R' Yehuda's view that it is mandatory. The binding, per the Gra (O.C. 651), requires a "*kesher gamur,*" which consists of a double knot, one tie atop another (which isn't about beautification). To accomplish this, we tie the *minim* with the *koishekel* and then tie another lulav leaf around the *koishekel.*

The Rambam (*Hilchos* Lulav 7:12) even rules that there should be no *chatzizah* interrupting between the *minim*, which, as the Brisker Rav notes, further suggests that this is not just about *noy*; rather, it is the *lechatchilah* manner of fulfilling the mitzvah.

Another proof that the binding is about more than *noy* can be adduced from Rabeinu Tam in Tosafos (Gittin 43b), which—directly answering your question—says that the binding of the *minim* should not be done by a woman, because she isn't obligated in the mitzvah. However, the matter is subject to a dispute among the *Rishonim.*

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Rashbam, the case of esrog may be more lenient for a number of reasons. These include the fact that perhaps there is a clear *umdena* that one wants the *tenai* to be valid even without the *tenai kaful* (Tosafos Kidushin 6b); *tenai kaful* may be unnecessary for *metaltelin* (Nesivos Hamishpat C.M. 207); and that even if the *tenai kaful* is needed but not performed, the recipient will still own the *arba'ah minim* (just that the condition of *al menas lehachzir* is invalid and it will not revert back to the owner) (Remach).

Some *Acharonim* are *machmir* that a *tenai kaful* should be added when borrowing *arba'ah minim* (Bikurei Yaakov; the Brisker Rav, cited in Mo'adim Uzmanim). However, the Kaf Hachaim rules that it is not needed, and it would seem that due to the considerations above, this is the basic halacha.